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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD DUANE ROOT,

Defendant and Appellant.

A096367

(Contra Costa County  
Super. Ct. No. 0000746-8)

Defendant appeals his conviction for assault with force likely to produce great bodily injury, use of a knife and infliction of great bodily injury. He raises two claims of instructional error. We affirm.

***Factual and Procedural Background***

Just before midnight on February 14, 2000, Robert Clevidence, an off-duty police officer, drove to the Old Hangout Bar in Concord. As Clevidence walked toward the bar, a pickup truck emerging from a parking stall nearly struck him, and Clevidence shouted at the driver, Billy Armtrout. Defendant, a passenger in the truck, yelled, “What are you going to do about it?” Clevidence responded that he was talking to Armtrout, and walked away. Defendant yelled profanities at Clevidence, got out of the truck and ran toward him. Defendant struck Clevidence several times and Clevidence fought back, knocking defendant to the ground. Armtrout got out of the truck and also struck Clevidence. After Clevidence knocked Armtrout down, defendant got up and again punched Clevidence. Clevidence testified, “I knocked him down at least [four] times, maybe [five], and every

time as soon as he would hit the ground, he would be back up attacking me again in an aggressive fist-fighting motion.” Armtrout punched Clevidence several more times also. While Clevidence was engaged with defendant and Armtrout, a female passenger in Armtrout’s truck, Lisa Johansen, hit Clevidence with a wooden sign. The bar owner, who had come outside, then saw defendant stab Clevidence. As Johansen attempted to strike Clevidence again, the bar owner took the sign from her and called the police. Clevidence testified that a few seconds after being hit with the sign, he felt a sharp blow to the left side of his chest. Clevidence realized he had been stabbed when he saw blood on his shirt. Defendant stood nearby with a knife in his right hand. Clevidence yelled for help, swung at defendant and knocked him to the ground.

As Clevidence walked away, the bar owner warned him that defendant was behind him. Clevidence turned and saw defendant, who still had the knife, “charging” him. Clevidence struck defendant in the head, knocking him to the ground. Clevidence went to his car and retrieved his gun. Pointing the gun over the roof of his car, he identified himself as a police officer and ordered defendant to the ground. Defendant got into Armtrout’s truck and put it in reverse, striking Johansen with the open driver’s door. Defendant stopped the truck and remained inside. Clevidence heard sirens. He went into the bar and gave his gun to the owner to put in the safe. The police arrived shortly after.

Defendant’s recitation of events differed markedly from that given by Clevidence. Defendant testified that Clevidence angrily yelled at Armtrout as Armtrout backed his truck out of the parking lot. Clevidence then walked to the passenger side of the truck and yelled at defendant. Defendant got out of the truck and argued with Clevidence. Defendant testified that neither he nor Clevidence exchanged any punches. As defendant got physically closer to Clevidence during the argument, Clevidence pulled out a gun. Johansen jumped out of the truck and got between the two men, telling Clevidence not to shoot. Defendant, fearing that Johansen would be shot, pushed her to the ground, pulled out his knife and swung it at Clevidence. Clevidence pushed defendant to the ground and hit him repeatedly in the back of the head with the gun. As defendant tried to get back

up, Clevidence struck him again. Defendant did not remember anything else until the police came.

Following a jury's guilty verdict defendant was sentenced to six years in state prison.

### *Discussion*

#### *Self-Defense Instruction*

Defendant contends the court had a sua sponte duty to give a further instruction on the right of self-defense. This argument is without merit.

In closing argument, the People argued that, “at a very minimum this is mutual combat.” At the People's request, and without objection from defendant, the court instructed the jury as follows: “The right of self-defense is only available to a person who engages in mutual combat if he or she has done all the following: [¶] He or she has actually tried, in good faith, to refuse to continue fighting; [¶] He or she has clearly informed his or her opponent that he or she wants to stop fighting; [¶] He or she has clearly informed his or her opponent that he or she has stopped fighting; and [¶] He or she has given his or her opponent the opportunity to stop fighting. [¶] After he or she has done these four things, he or she has the right to self-defense if his or her opponent continues to fight.”<sup>1</sup> The prosecutor argued that defendant had no right of self-defense because he had not complied with these four steps.

Consistent with defendant's trial testimony, defense counsel argued that defendant was not involved in mutual combat, but was merely defending himself and Johansen against what defendant believed was a probable shooting by Clevidence.

Defendant acknowledges the general rule that a person engaged in mutual combat cannot rely on the right of self-defense unless he first attempts to withdraw from the fight

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<sup>1</sup> CALJIC No. 5.56. In addition, the court gave the following CALJIC instructions on self-defense: No. 5.30 [Self-Defense Against Assault]; No. 5.31 [Assault with Fists—When Use of Deadly Weapon Not Justified], No. 5.32 [Use of Force in Defense of Another], No. 5.50 [Self-Defense—Assailed Person Need Not Retreat]; No. 5.51 [Self-Defense—Actual Danger Not Necessary], No. 5.52 [Self Defense—When Danger Ceases], No. 5.53 [Self-Defense Not An Excuse After Adversary Disabled]; No. 5.54 [Self-Defense By An Aggressor]; No. 5.55 [Plea of Self-Defense May Not Be Contrived.]

and communicates that desire to his opponent. However, defendant points out that the law recognizes an exception to this general rule when one of the combatants suddenly escalates the fight by resorting to deadly force. Defendant quotes *People v. Gleghorn* (1987) 193 Cal.App.3d 196, 201: “[W]hen [a combatant] responds in a sudden and deadly counterassault, the [other combatant] need not attempt to withdraw and may use reasonably necessary force in self-defense.” He argues that an additional instruction based on this principle would have informed the jury that defendant could rely on self-defense if Clevidence pointed a gun at him and Johansen.

A trial court has a duty to instruct sua sponte on the general principles of law relevant to the issues raised by the evidence. The general principles of law governing a case are those principles closely and openly connected with the facts before the court, necessary for the jury’s understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The duty extends to defenses when it appears that the defendant is relying on such a defense, or when there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case. (*People v. Barton* (1995) 12 Cal.4th 186, 195.)

The court had no sua sponte duty to give the self-defense instruction raised by defendant on appeal. Defendant did not rely on this theory of self-defense. He testified that he was *not* a mutual combatant. Defendant stated that he only argued with Clevidence before Clevidence pulled his gun. Defendant maintained that he stabbed Clevidence to prevent Johansen from being shot. No other evidence supported the instruction. Based on the prosecution evidence, Clevidence and defendant were engaged in a fistfight. In the midst of the fight, Johansen struck Clevidence with a wooden sign. Defendant then stabbed Clevidence. Clevidence had not drawn his gun at the time he was stabbed. Contrary to defendant’s assertion, there is no evidence that Clevidence escalated the fistfight with “a sudden and deadly counter assault” before defendant stabbed him.

***CALJIC No. 17.41.1***

Defendant claims the court erred in instructing the jury with CALJIC No. 17.41.1. He contends that, by giving this instruction, the court inhibited the jury's free and open deliberations, invaded the privacy of the jurors, and interfered with the right to a unanimous jury.

Defendant raised no objection in the trial court to this instruction. Because CALJIC No. 17.41.1 did not affect his substantial rights, he has waived a claim of error on appeal by failing to object. (See *People v. Elam* (2001) 91 Cal.App.4th 298, 311-313.) After briefing was completed, the Supreme Court decided *People v. Engleman* (July 18, 2002, S086462) \_\_\_ Cal.4th \_\_\_ [2002 DJDAR 8034], concluding that, although the court disapproved CALJIC No. 17.41.1, it was not error for the trial court to have given it. Further, under the circumstances of this case, there is no indication that the instruction affected the outcome in any way.

***Disposition***

The judgment is affirmed.

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Corrigan, J.

We concur:

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McGuiness, P.J.

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Parrilli, J.